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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-528**

Brian John Holsapple, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 12, 2011
Affirmed; motions denied
Peterson, Judge**

McLeod County District Court
File No. 43-CR-08-1244

Brian John Holsapple, Moose Lake, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael Junge, McLeod County Attorney, Glencoe, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and
Peterson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

This pro se appeal is from an order that denies appellant's petition for postconviction relief without an evidentiary hearing. Because appellant's claims were

known to him when he directly appealed his convictions, they are barred. We, therefore, affirm, and we deny appellant's motion to strike.

FACTS

Following two guilty pleas, appellant Brian John Holsapple was convicted of first-degree criminal sexual conduct, possession of child pornography, fifth-degree criminal sexual conduct, and felony domestic assault. The complaint alleged that appellant engaged in repeated acts of sexual penetration with his 14-year-old daughter over a five-year period, appellant's computer hard drives contained images of apparent child pornography, and appellant exposed himself to his 14-year-old daughter and his younger daughter while playing strip poker.

Appellant agreed to plead guilty to one count of possession of child pornography and one count of felony domestic assault. In exchange, the state dismissed three counts, which left five counts for trial. Appellant and the state reached a second agreement, which resolved the case. Appellant agreed to plead guilty to one count of first-degree criminal sexual conduct and two counts of gross-misdemeanor fifth-degree criminal sexual conduct (indecent exposure in presence of person under age 16). In exchange, the state agreed to dismiss the two remaining charges and withdraw its motion for an upward durational sentencing departure. The district court accepted appellant's plea and ordered a presentence-investigation report and a psychosexual evaluation.

At his sentencing hearing, appellant sought a continuance, which the district court denied. The state urged the court to follow the sentencing guidelines and sentence appellant to 144 months in prison because the presentence investigation and two

psychosexual evaluations showed that appellant was not honest or remorseful and did not accept responsibility or express a desire to go to treatment or change his life. The court sentenced appellant to the presumptive 144-month prison term and a \$10,000 fine for the first-degree criminal-sexual-conduct conviction and ordered restitution in an amount to be determined by probation. In a direct appeal, appellant argued only that the district court abused its discretion by denying his request to continue the sentencing hearing, and this court affirmed the denial. *State v. Holsapple*, No. A09-1010 (Minn. App. Apr. 20, 2010), *review denied* (Minn. June 29, 2010).

Appellant petitioned for postconviction relief, seeking to withdraw his second guilty plea. Appellant claimed that (1) he was denied his right to effective assistance of trial counsel, (2) his plea was invalid, (3) the prosecutor violated the plea agreement and committed misconduct, and (4) the district court erred by ordering probation to determine the restitution amount. Appellant also requested that the district court judge be removed and that he be appointed legal counsel.

Without conducting an evidentiary hearing, the district court denied appellant's petition for postconviction relief. The court also denied appellant's requests to remove the district court judge and to appoint legal counsel. This appeal followed. Appellant has moved to strike the state's brief.

DECISION

I.

A postconviction court may deny a postconviction petition without an evidentiary hearing if the petition, files, and record conclusively demonstrate that no relief is

warranted. Minn. Stat. § 590.04, subd. 1 (2010). A district court's summary denial of postconviction relief is reviewed for an abuse of discretion. *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011).

“[W]here direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief.” *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). “There are two exceptions to the *Knaffla* rule: (1) a claim is so novel that the legal basis was not available on direct appeal, or (2) the interests of justice require review.” *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007). Under the second exception, a petition must show that the failure to raise the issue on direct appeal was not deliberate and inexcusable. *Id.*

In his postconviction petition, appellant claimed that (1) he was denied his right to effective assistance of trial counsel, (2) his plea was invalid, (3) the prosecutor violated the plea agreement and committed misconduct, and (4) the district court erred by ordering probation to determine restitution. All of these issues were known at the time of appellant's direct appeal.

Appellant's claim that he was denied his right to effective assistance of trial counsel is based on a conversation that he had with his trial counsel before pleading guilty. Although this claim was known to appellant at the time of his direct appeal, he argues that it is not *Knaffla* barred because he was unable to raise it. But appellant does not explain why he was unable to raise the claim in his direct appeal or why his failure to raise it was not deliberate and inexcusable. Because appellant knew of this claim at the

time of his direct appeal and he has not shown that either *Knaffla* exception applies, the claim is barred.

Appellant alleges that his second guilty plea, which resolved the case, was invalid. He asserts that the plea was involuntary because his counsel advised him “to lie to get the plea agreement” and unintelligent because the district court judge interfered in the plea negotiations by offering “a 3 year deal.” Because this claim is based on events that allegedly occurred before appellant pleaded guilty, appellant knew of the claim at the time of his direct appeal. Appellant has not explained why a *Knaffla* exception applies to this claim. Therefore, the claim that his plea was invalid is barred.

Appellant claims that the prosecutor violated the second plea agreement and committed misconduct by not upholding her agreement to depart from the sentencing guidelines. This claim is based on allegations that the prosecutor agreed to recommend a downward departure as part of the plea agreement and failed to do so at sentencing. Because this claim is based on events that allegedly occurred before appellant was sentenced, the claim was known to appellant at the time of his direct appeal. Because appellant has not shown that a *Knaffla* exception applies, the claim is barred.

Appellant claims that the prosecutor committed misconduct because she “coerced a confession” from one of the victims and introduced false evidence. Appellant contends that on December 6, 2008, the prosecutor submitted the coerced confession, “a handwritten statement from [the victim] stating everything [her sister, the other victim,] was saying to be true,” and that the prosecutor committed misconduct by “introducing false evidence in the child pornography charge.” Because these alleged events occurred

before appellant made his direct appeal, and appellant has not made any argument why a *Knaffla* exception applies to his failure to assert a prosecutorial-misconduct claim in his direct appeal, the claim is barred.

Appellant claims that the district court erred by ordering probation to determine restitution. At the end of appellant's sentencing hearing, the district court ordered probation to determine restitution. Appellant knew or should have known about this claim at the time of his direct appeal, and he has not made any argument why a *Knaffla* exception applies to the claim. Accordingly, the claim is barred.

Because each of appellant's claims is barred under *Knaffla*, the district court did not abuse its discretion by summarily denying appellant's petition for postconviction relief. Because we are affirming the denial of appellant's petition, we will not address appellant's request that a different district court judge be appointed to consider his claims on remand.

II.

Appellant moves to strike the state's brief because it contains false statements. The procedural history in the state's brief states that after this court affirmed appellant's conviction on direct appeal, no petition for further review was filed. This statement is incorrect. Appellant petitioned the supreme court for review, and review was denied. *Holsapple*, No. A09-1010. But the incorrect statement is not material to any issue raised on appeal. The state's brief also states that appellant did not provide this court with a transcript of the plea hearing or an affidavit indicating that appellant's plea-hearing testimony was false. Appellant argues that the statement about his failure to provide an

affidavit is false because he produced the affidavits of five individuals stating that they were present when appellant's attorney told him to lie on the witness stand and say that he is guilty. But we understand the statement about appellant's failure to submit an affidavit to mean that appellant did not submit his own affidavit stating that his testimony at the plea hearing was false. This statement is supported by the record; although appellant submitted five affidavits, he was not the affiant for any of the affidavits. Accordingly, we deny appellant's motion to strike the state's brief.

III.

Appellant has filed a motion to submit newly discovered evidence in the form of an affidavit from his younger daughter, in which she questions the accuracy of notes prepared by the prosecutor who interviewed her several times. This court cannot base its decision on matters outside the record on appeal, and the affidavit fails to satisfy the extremely limited criteria for the appellate admission of evidence that is conclusive or uncontroverted. *See Chahla v. City of St. Paul*, 507 N.W.2d 29, 33 (Minn. App. 1993). We, therefore, deny appellant's motion.

Affirmed; motions denied.